No. 19-309

IN THE

Supreme Court of the United States

GOVERNOR OF DELAWARE,

Petitioner,

v.

JAMES R. ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CAMPAIGN LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization founded in 2002 by former Federal Election Commission Chairman Trevor Potter. Its vision is to hold candidates and government officials accountable regardless of political affiliation. Since its inception, CLC has litigated or been involved in approximately 100 cases regarding voting rights, gerrymandering, and campaign finance and disclosure laws. Through this work, CLC seeks to strengthen the democratic process across all levels of government.

CLC does not favor one of the nation's political parties over any other party or unaffiliated voters. CLC's mission is focused on—and its expertise is built on—laws, rules, and regulations affecting accountability in democratic institutions. This expertise informs its view of how a judicial ruling in one of these areas can affect institutions across the governmental spectrum. It believes that the risk of unintended consequences here is particularly acute.

SUMMARY OF ARGUMENT

Many federal and state entities are governed by, and function independently because of, carefully constructed political balances. A broad ruling in Respondent James R. Adams's favor would unleash a flood of litigation aimed

1. Pursuant to Supreme Court Rule 37.6, the *amicus curiae* states that this brief is filed with the written consent of the parties. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

at disassembling those structures. Adams is unaffiliated with either the Democratic or Republican Party and challenges Delaware's process of judicial selection codified in Article IV, Section 3 of the Delaware Constitution ("Section 3"). Section 3 provides that no more than a "bare majority" of certain judges may be members of one party (the "bare majority provision") and the remainder must be of the state's other major political party (the "major party provision"). *See* Pet. Br. at 2–3 (quoting Del. Const. art. IV, § 3). Adams argues that the major party provision violates his First Amendment rights by excluding individuals like him from serving as judges because of their partisan affiliation, or lack thereof.

This Court has previously ruled that states may condition judicial service on qualities designed to preserve well-functioning judiciaries. In *Gregory v. Ashcroft*, the Court upheld Missouri's mandatory retirement age for judges, stressing that the process through which the people of a state "establish a qualification for those who sit as their judges" was a "decision of the most fundamental sort for a sovereign entity." 501 U.S. 452, 460 (1991).

Adams contends, wrongly, that considering partisan affiliation cannot serve this compelling interest. He gives short shrift to the fact that partisanship is *already* a dominant consideration in states with partisan judicial elections. *See Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002) (documenting history of these elections and upholding right of judicial candidates to "announc[e] their views on disputed legal and political issues"). Section 3 reflects this reality. *See infra* I.A.

Adams also minimizes the *Elrod-Branti* line of cases holding that state governments may consider political affiliation in making employment decisions about policymakers. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Elrod v. Burns*, 427 U.S. 347, 365–68 (1976) (plurality op.); *id.* at 374 (Stewart, J., concurring in the judgment). The Sixth and Seventh Circuits have concluded that judges are policymakers under this inquiry. *See infra* I.B.

Section 3's reach is narrow. But the relief Adams seeks could have far-reaching effects. He urges this Court to strike down Delaware's constitutional provisions assuring partisan balance in judicial appointments. Such a ruling not only would upend Delaware's judicial-appointment process, but also could jeopardize the political equilibria holding together countless agencies, commissions, and panels outside of Delaware—equilibria that voters, through their elected representatives, have expressly authorized. *See infra* II.

Any opinion that invalidates Section 3 should not draw into question the constitutionality of other appropriately designed systems. Federal and state governments have designed politically balanced commissions and agencies that encompass a range of issues, including, but not limited to, the judiciary. *See infra* II. Congress, for example, has enacted laws preventing single-party rule of agencies that operate with some independence from the Executive Branch, including those overseeing civil service employment, interstate commerce, international trade, communications, and elections. A number of states have also implemented partisan-balancing structures to

populate civil service, election, redistricting, and judicial nominating commissions. An overly broad ruling that the First Amendment prohibits *any* partisan considerations in filling offices that are independent from the appointing authority would jeopardize nearly 150 years of practice at the federal and state levels, threaten a range of governmental entities, and undermine legislatures' efforts to shape democratic institutions as they see fit.

ARGUMENT

I. The First Amendment does not prohibit a state government from considering the partisan affiliation of judicial candidates.

Reversal of the decision below is warranted on two grounds. First, this Court has held that states have a compelling interest in setting eligibility criteria for their judges—precisely what Delaware has done here. Second, judges are policymakers within the meaning of *Elrod-Branti*, and states may therefore consider political affiliation in filling their judiciaries.

A. States have a compelling interest in setting eligibility criteria for their judicial officers.

States are afforded great latitude in exercising their sovereign prerogatives. That principle has long animated our nation's system of government. *See* The Federalist No. 45 (James Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."). In *Gregory*

v. Ashcroft, this Court confirmed that those prerogatives include a state's selection of its judicial officers. 501 U.S. at 472–73. The Court recognized that states have a "legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform," and that it would not strike down a "reasonable response" to a state's concern with ensuring a competent and well-functioning judiciary. *Id.* at 472; *see also Elrod*, 427 U.S. at 368 (plurality op.) ("Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms.").

Section 3 reflects the approach that Delaware has chosen for structuring its judiciary. One of the eligibility criteria it has adopted for those seeking to become state judges is political affiliation. That criterion already pervades judicial selection elsewhere. Partisan elections are used to elect judges of both the highest court and trial courts in six states; three additional states use partisan elections to select trial court judges. *See* Ala. Const. art. VI, § 152 (supreme court and trial court); Ill. Const. art. VI, § 12 (supreme court and trial court); La. Const. art. V, § 22 (supreme court and trial court); N.C. Const. art. IV, § 16 (supreme court and trial court); N.Y. Const. art. VI, § 6 (trial court); Pa. Const. art. V, § 13 (supreme court and trial court); Tenn. Const. art. VI, § 4 (trial court); Tex. Const. art. V, §§ 2, 7 (supreme court and trial court); Ind. Code. § 3-10-2-11 (trial court); *see also* Brennan Ctr. for Justice, *Judicial Selection: An Interactive Map*, http://judicialselectionmap.brennancenter.org (last visited Jan. 27, 2020). Section 3 acknowledges the reality that, like water finding a crack, politics always finds its way into judicial selection. Delaware has attempted to minimize the

risk of a monopoly on its judiciary by ensuring partisan balance as a matter of law. Section 3 should be upheld.

B. States may consider judicial candidates' political affiliation because judges are policymakers.

Separate from having a compelling interest in selecting judges, states may consider political affiliation in making employment decisions for "policymaking positions"—a category defined by the "nature of the responsibilities" involved. *Elrod*, 427 U.S. at 367 (plurality op.). "[A] position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Branti*, 445 U.S. at 518. The inquiry is whether Delaware "can demonstrate that party affiliation is an appropriate requirement for the effective performance" of its judiciary. *Id.* It can.

1. The Sixth and Seventh Circuits' conclusion that judges are policymakers should be endorsed.

The Sixth and Seventh Circuits have examined the role state judges fill in our system of government and concluded, correctly, that judges formulate, execute, and review policy for purposes of *Elrod-Branti*. In *Kurowski v. Krajewski*, the Seventh Circuit contrasted a public defender, who the court held could not be fired based on "political criteria," with a judge, who it reasoned "both makes and implements governmental policy." 848 F.2d 767, 769–70 (7th Cir. 1988) (noting judgeships implicitly have a "political component"). In *Newman v. Voinovich*, the Sixth Circuit recognized that "judges are policymakers

because their political beliefs influence and dictate their decisions on important jurisprudential matters." 986 F.2d 159, 163 (6th Cir. 1993); *see also id.* at 164 (C. Kennedy, J., concurring) ("[t]he wisdom of the governors' policies" to appoint judges only of their political party, if detrimental to the state, could be remedied "in the voting booths").

These holdings have their roots in common law. In surveying the precedent of writs of mandamus in *Marbury v. Madison*, Chief Justice Marshall cited Lord Mansfield, who "state[d] with much precision and explicitness" the expectation of judges:

> "Whenever," says that very able judge, "there is a right . . . [and] no other specific legal remedy, *this court ought to assist* by mandamus, upon reasons of justice, as the writ expresses, and *upon reasons of public policy*, to preserve peace, order and good government."

5 U.S. (1 Cranch) 137, 168–69 (1803) (emphases added). Long before *Elrod-Branti*, this Court recognized that judges have a significant—and inescapable—impact on public policy.

2. The Third Circuit's conclusions that Section 3 does not protect a compelling state interest and that judges are not policymakers are unfounded and should be rejected.

The Third Circuit held that Delaware's "practice of excluding Independents and third party voters from judicial employment is not narrowly tailored" to serve a

politically balanced judiciary and, moreover, that judges are not policymakers, in part because "political loyalty is not an appropriate job requirement" for them. Pet. App. 24a, 30a. The Circuit Court was wrong on both counts.

First, Delaware's commitment to partisan balance on its courts does not violate the First Amendment merely because it excludes some potential jurists from consideration. Section 3 is Delaware's method of guarding against a judicial monopoly by one party or, equally problematic, judges from like-minded but distinct parties. In doing so, the state has protected its courts "from becoming political spoils." Pet. Cert. Br. 6; *see also* Cert. Br. for Former Govs. of Del. 7 ("Delaware's Constitution has allowed its Governors to shape a uniquely successful nonpartisan judiciary free from the pressures of party politics that otherwise would inevitably arise to impede the faithful balancing of the State's courts."). Even if Delaware's eligibility criteria adversely affect politically unaffiliated aspirants like Adams, Delaware has determined that such criteria promote its compelling interest in a well-functioning judiciary, just as Missouri's mandatory retirement provision did in *Gregory*. *See* 501 U.S. at 472.

Second, the Third Circuit's determination that "judges perform purely judicial functions," unlike "elected officials and agency representatives who explicitly make policy," is unmoored both from case law and historic practice. Pet. App. 31a. This Court has already considered—and rejected—the notion that partisan affiliation cannot be an appropriate consideration in the selection of judges. "As one obvious example, if a State's election laws require that precincts be supervised by two election judges of

different parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Branti*, 445 U.S. at 518.

Judges also significantly impact public policy through the promulgation of rules and guidelines. Nearly 200 years ago, Chief Justice Marshall observed that Congress may "confer[] on the judicial department" the power to "make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Over a century later, the Court accordingly upheld the constitutionality of the Rules Enabling Act of 1934, which authorized the federal judiciary to promulgate the Federal Rules of Civil Procedure. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941). These rules incorporate and advance important public policies. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) ("The 'strong public policy' underlying the work-product doctrine . . . has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).").

The Court has similarly upheld "Congress' decision to require at least three federal judges to serve on the [United States Sentencing] Commission and to require those judges to share their authority with nonjudges." *Mistretta v. United States*, 488 U.S. 361, 397 (1989). The purposes of the Commission are to "establish sentencing policies and practices for the Federal criminal justice system" and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. § 991(b). And, contrary to the idea that judges do not make policy, "sentencing is a field in which the Judicial Branch

long has exercised substantive or political judgment." *Mistretta*, 488 U.S. at 396; *see also id.* at 393 ("We do not believe, however, that the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch."). At least twenty-one states employ similar sentencing commissions that include judges. *See* Kelly Lyn Mitchell, Robina Inst. Crim. L. & Crim. J., *Sentencing Commissions and Guidelines By The Numbers* 3 & tbl. 1 (2017) ("Nearly every commission includes members who are judges, prosecutors, and defense attorneys."), https://sentencing.umn.edu/sites/sentencing.umn.edu/files/703186_robina_sg_booklet_rev_2.pdf.

Judges also supervise and direct court staff and programs. *See, e.g.*, 28 U.S.C. § 331 (Judicial Conference of the United States shall "submit suggestions and recommendations to the various courts"); *id.* §§ 620, 621, 623(a)(1) (directing the Federal Judicial Center and directing its Board to establish policies and develop programs, among other things). And, though not legislators, judges may and do consider issues of public policy to determine what the law is, particularly when deciding questions of constitutional or common law. *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 849 (1990) ("[O]ur precedents establish that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy." (emphasis, internal quotation marks, and citations omitted)); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983) ("As with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public

policy."); *United States v. Hasting*, 461 U.S. 499, 505 (1983) ("'[G]uided by considerations of justice,' and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." (citation omitted)).

Delawareans made a "considered judgment[]" in an "area central to their own governance—how to select those who 'sit as their judges.'" *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (quoting *Gregory*, 501 U.S. at 460). In addition, as the Sixth and Seventh Circuits held, judges are policymakers. *Newman*, 986 F.2d at 163; *Kurowski*, 848 F.2d at 769–70. States may therefore consider applicants' political affiliations before appointing them to judgeships. This Court should reverse the decision below.

II. Any ruling affirming the decision below should not cast doubt on the constitutionality of other partisan-balancing regimes.

If the Court nonetheless upholds the Third Circuit's decision striking down Section 3, it should rule narrowly to avoid casting doubt on partisan-balancing requirements for other government entities. Section 3 should only be invalidated—if at all—to the extent Delaware's major party provision excludes from consideration those who do not affiliate with either of the state's two major parties. Any broader endorsement of the Third Circuit's opinion would refashion the First Amendment's shield, which under *Elrod-Branti* protects public servants from patronage systems, into a sword used to undermine efforts to combat partisanship in public administration. *Elrod-Branti*'s policymaking exception cannot, and should not,

depend entirely on whether an appointing official may properly expect "loyalty" from the employee at issue, *see* Pet. App. 20a, or no partisan-balancing requirement would be safe.

A. Historic Partisan-Balancing Requirements

For more than 150 years, legal restrictions have existed at the federal and state levels to prevent single-party rule of public bodies. Many states have amended their constitutions or enacted laws to limit partisan membership on commissions tasked with maintaining a nonpartisan civil service, regulating elections, drawing electoral districts, and nominating judges. Congress has similarly and repeatedly limited same-party leadership of multimember federal agencies that operate with some independence from the Executive Branch. *See generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 588 (2010) (Breyer, J., dissenting) (cataloguing federal agencies that exhibited one or more of "six criteria that may suggest [an agency's] independence," including "whether its members are required, by statute, to be bipartisan (or nonpartisan)"); *Myers v. United States*, 272 U.S. 52, 269–71 (1926) (Brandeis, J., dissenting) (collecting statutes) ("Congress has imposed . . . restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis." (footnotes omitted)).

One of the earliest federal partisan-balancing requirements was enacted in 1872.[2] Since then, and

2. Act of June 10, 1872, ch. 415, 17 Stat. 347, 348 (providing for the appointment of two election supervisors "of different political

without exception, the Executive Branch has abided by such statutory restrictions. *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 13–14 (2018) (finding "no reported instances of outright [partisan-balancing requirement] violations—no case, that is, in which a President has sought to exceed the statutory cap on commissioners from a single party").

Some scholars have examined whether partisan-balancing requirements, "when coupled with either a good cause removal protection or a fixed term of office," infringe on the President's Article II authority. Ronald J. Krotoszynski, Johnjerica Hodge, & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 961 (2015). But CLC is not aware of any court that has ever ruled the First Amendment bars consideration of partisan balance in appointing members to an independent agency. *Cf. Nat'l Comm. of Reform Party of U.S. v. Democratic Nat'l Comm.*, 168 F.3d 360, 365 (9th Cir. 1999) (holding that plaintiff political party lacked standing to challenge statutory limit on same-party members of the Federal Election Commission because the provision "is on its face intended to *diversify* the membership of the Commission and to prevent the party of the President from dominating the Commission"). To do so would undermine the purpose

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parties" in each congressional district by the federal circuit judge covering that district). Ten years later, through the Edmunds Act, Congress vacated the Utah Territory's registration and election offices and established an interim "board of five persons . . . , no more than three of whom shall be members of one political party," to perform electoral functions "until other provision be made" by a future territorial legislature. Act of Mar. 22, 1882, ch. 47, § 9, 22 Stat. 30, 32.

of partisan-balancing requirements and the entities they govern. The following sections describe various federal and state entities that have been subject to partisan-balancing requirements.

B. Federal and State Civil Service Commissions

In 1883, the "moral crusade" for a merit-based, politically neutral, and bureaucratically efficient civil service prevailed over the "spoils system" of "strictly partisan" patronage made popular by the administration of Andrew Jackson. *See Developments in the Law: Public Employment*, 97 Harv. L. Rev. 1611, 1624–29 (1984). At the federal level, these reforms culminated in the Pendleton Act, which provided for the selection of public servants based on standardized-examination scores and required that no person employed in the civil service be "under any obligations to contribute to any political fund, or to render any political service" or "removed or otherwise prejudiced for refusing to do so." Act of Jan. 16, 1883, ch. 27, § 2, 22 Stat. 403, 404. Congress granted rulemaking authority to the United States Civil Service Commission ("CSC"), which comprised three members, "not more than two of whom shall be adherents of the same party." *Id.* § 1, 22 Stat. at 403. Civil-service reformer Dorman B. Eaton, who testified before the Senate during its deliberations of the Pendleton bill, described the CSC as "a body which . . . is to stand independent as between parties, so as to exercise its authority irrespective of political influences." S. Rep. No. 47-576, at 7 (1882).[3]

3. In a 1978 reorganization, Congress renamed the CSC the Merit Systems Protection Board ("MSPB"), transferred some of its functions to the newly established Office of Personnel Management,

States followed with similar measures. The same year Congress created the CSC, New York Assemblyman Theodore Roosevelt championed, and Governor Grover Cleveland signed, a bill establishing an analogous state commission of three members, no more than two of whom could belong to the same political party. *See generally* First Report of the Civil Service Commission of the State of New York (Jan. 31, 1884), https://babel.hathitrust.org/cgi/pt?id=njp.32101066082239. That restriction remains in effect. N.Y. Civ. Serv. Law § 5(2)(a).

After a "careful study" of civil service reforms in other states (including New York), New Jersey established its own civil-service commission in 1908. First Annual Report of the Civil Service Commission of the State of New Jersey 5 (Dec. 15, 1908), https://babel.hathitrust.org/cgi/pt?id=osu.32435066741703. The current statute provides that "[n]o more than three of the five members shall be of the same political party." N.J. Stat. Ann. § 11A:2-3.

Other states vary in how they maintain partisan balance in their civil service commissions. Pennsylvania's "consist[s] of three full-time members, not more than two of whom shall be of the same political affiliation." 71 Pa. Cons. Stat. Ann. § 3001(a). Ohio requires that, "[a]t the time of any appointment" of a person to a three-member municipal or township civil service commission, "not more than two commissioners shall be adherents of the

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and established the Federal Labor Relations Authority ("FLRA"). *See* Civil Service Reform Act of 1978, Pub. L. No. 95–454, tit. II, §§ 201(a), 202(a), 701, 92 Stat. 1111, 1118–19, 1121–22, 1191, 1196; Reorganization Plan No. 2, §§ 101–02, 201(a), 301, 92 Stat. 3783, 3784, 3785–86 (1978). The bare majority limits on the membership of the MSPB and FLRA remain in place today. 5 U.S.C. §§ 1201, 7104(a).

same political party." Ohio Rev. Code Ann. § 124.40(A). Affirming the Third Circuit's sweeping opinion would put all these important commissions at risk.

C. Federal Regulatory Agencies

Partisan-balancing requirements are among the core "structural characteristics" that are "common to almost all federal regulatory agencies." *F.T.C. v. Flotill Prods., Inc.*, 389 U.S. 179, 187 (1967).

1. Interstate Commerce Commission

American corporations, especially those operating the railroads, experienced dramatic growth and influence in the late nineteenth century. Congress responded with the Interstate Commerce Act of 1887. Pub. L. No. 49-104, 24 Stat. 379 (1887). "[T]he great purpose of the act . . . was to secure equality of rates as to all, and to destroy favoritism." *N.Y., N.H. & H.R. R. Co. v. Interstate Commerce Comm'n*, 200 U.S. 361, 391 (1906). The Act also established and granted regulatory authority to the Interstate Commerce Commission ("ICC"), composed of five members, no more than three of whom could "be appointed from the same political party." § 11, 24 Stat. at 383. When Congress later enlarged the ICC to seven members, it proportionally enlarged the limit on same-party membership to five. Pub. L. No. 65-38, § 1, 40 Stat. 270 (1917).

In 1995, Congress abolished the ICC, transferred its remaining assets and personnel to a three-member Surface Transportation Board ("STB"), and provided that no more than two of its members "may be [a]ppointed

from the same political party." Pub. L. No. 104-88, §§ 101, 201, 203, 109 Stat. 803, 804, 932, 941 (1995). Congress later increased the STB's membership from three to five and raised its same-party limit from two to three. Pub. L. No. 114-110, § 4, 129 Stat. 2228, 2229 (2015) (codified at 49 U.S.C. § 1301(b)(1)).

2. Federal Trade Commission and Other Contemporaneous Agencies

During the Wilson Administration, Congress created several new agencies with partisan-balancing limits. The 1914 originating statute for the Federal Trade Commission ("FTC") provides that it "shall be composed of five commissioners . . . . Not more than three of the commissioners shall be members of the same political party." Pub. L. No. 63-203, § 1, 38 Stat. 717, 717–18 (1914). This Court observed that the FTC "is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935). The Senate report on the bill establishing the FTC declared "that it was essential that the commission should not be open to the suspicion of partisan direction." *Id.* at 625 (citing S. Rep. 63-597 at 22 (1914)). And the "debates in both houses demonstrate that the prevailing view was that the Commission . . . [should be] free from 'political domination or control.'" *Id.*

Two years later, Congress established four more administrative agencies with limitations on partisan membership. The originating statutes for three of them—the Federal Farm Loan Board, United States Shipping Board, and United States Employees' Compensation Commission—contained "bare majority" limitations.

Pub. L. No. 64-158, § 3, 39 Stat. 360, 360 (1916); Pub. L. No. 64-260, § 3, 39 Stat. 728, 729 (1916); Pub. L. No. 64-267, § 28, 39 Stat. 742, 748 (1916). The fourth agency, the United States Tariff Commission ("USTC"), permitted no more than half of its six members to be "of the same political party." Pub. L. No. 64-271, § 700, 39 Stat. 756, 795 (1916).[4] Congress later renamed the USTC the United States International Trade Commission but left intact its limit on same-party members. Pub. L. No. 93-618, §§ 171, 172, 88 Stat. 1978, 2009–10 (1975). That limit remains in force. 19 U.S.C. § 1330(a) (2018).

3. Securities and Exchange Commission

In 1934, Congress established the Securities and Exchange Commission ("SEC"), a nonpartisan federal agency tasked with protecting investors and maintaining fair and efficient markets. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, §§ 2, 4(a), 48 Stat. 881, 881–82, 885 (1934). No more than a bare majority—three out of the five SEC members—"shall be members of the same political party." *Id.* § 4(a), 48 Stat. at 885. This bare majority limit remains in effect. 15 U.S.C. § 78d(a) (2018).

4. Federal Communications Commission

The same year Congress established the SEC, it also established the Federal Communications Commission

4. This was not the first time Congress had attempted to curb partisan influence in international trade. An 1890 act on the importation of merchandise provided for the appointment of nine general appraisers, "[n]ot more than five of [whom] shall be appointed from the same political party." Ch. 407, § 12, 26 Stat. 131, 136.

("FCC"), an independent body created to execute the policy of "regulating interstate and foreign commerce in communication by wire and radio." Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (1934). And as with the SEC, Congress provided that no more than a bare majority of the FCC—four out of the seven members—could be members of the same political party. *Id.* § 4(b), 48 Stat. at 1067. Congress later reduced the FCC's size from seven to five commissioners but retained the bare majority provision, which remains in effect. *See* Pub. L. No. 97-253, § 501(b)(1)–(2), 96 Stat. 805, 805–06 (1982); 47 U.S.C. § 154(b)(5) (2018).

5. United States Commission on Civil Rights

Partisan-balancing limits were also enacted for the United States Commission on Civil Rights ("CCR"). Established in 1957 against a backdrop of civil strife, the CCR was designed to be bipartisan. *See* 140 Cong. Rec. 27,214, 27,216 (Oct. 3, 1994) (statement of Rep. Edwards) (the Commission is a "bipartisan, independent Federal factfinding agency"). Congress originally provided that no more than three of its six members "shall at any one time be of the same political party." Civil Rights Act of 1957, Pub. L. No. 85–315, § 101(b), 71 Stat. 634, 634. Subsequent amendments increased the CCR's membership to eight but maintained the restriction on any party holding more than half of the Commission's seats. Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103–419, sec. 2, § 2(b), 108 Stat. 4338, 4338 (codified at 42 U.S.C. § 1975(b)); United States Commission on Civil Rights Act of 1983, Pub. L. No. 98–183, § 2(b)(1), 97 Stat. 1301, 1301.

6. Other Federal Agencies

At least a dozen other federal regulatory agencies existing between 1979 and 2014 employed partisan-balancing requirements, including the Commodity Futures Trading Commission, Consumer Product Safety Commission, Defense Nuclear Facilities Safety Board, Equal Employment Opportunity Commission, Export-Import Bank, Farm Credit Administration, Federal Deposit Insurance Corporation, Federal Energy Regulatory Commission, Federal Maritime Commission, National Credit Union Administration, National Mediation Board, National Transportation Safety Board, Nuclear Regulatory Commission, and Postal Regulatory Commission. *See* Feinstein & Hemel, 118 Colum. L. Rev. at 31 & n.83.

Affirming the Third Circuit's narrow interpretation of *Elrod-Branti*'s policymaking exception as applying only to party loyalists could throw into question the constitutionality of the partisan-balancing requirements of every one of these agency boards and commissions.

D. Sentencing Commissions

The United States Sentencing Commission, discussed *supra* I.B.2, similarly requires a measure of partisan balance. "[T]he Commission is an 'independent' body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines." *Mistretta*, 488 U.S. at 385 (quoting 28 U.S.C. § 991(a)). "Not more than four of the members of the Commission shall be members of the same political party, and of the

three Vice Chairs, no more than two shall be members of the same political party." § 991(a).

The Model Penal Code: Sentencing, approved in 2017, also provides for the establishment of independent, nonpartisan sentencing commissions. § 6A.01 (2017). The American Law Institute observed that "a commission's work product is better respected, and meets less resistance in the field, if there are no suspicions that the commission has been captured by one political viewpoint." *Id.* at cmt. g; *see also* § 6A.02 cmt. a ("It is generally desirable that the membership represent a full range of perspectives on criminal-justice issues, and that it not be politically or ideologically unbalanced."). "Given the large number of sentencing commissions that have been created across the nation since the late 1970s, it is notable that there have been virtually no successful challenges on structural constitutional grounds to the composition of the commissions, or their exercises of authority." *Id.* § 6A.01 cmt. c.

E. State and Federal Election Commissions

Partisan-balance requirements are also embedded in federal and state election commissions.

1. Federal Election Commission

Congress established the Federal Election Commission ("FEC") in 1974 after concluding that "campaign finance laws largely had been ignored" and in the wake of the Watergate controversy, which highlighted the need for "an independent, nonpartisan" commission. Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of*

Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission, 4 Yale J. on Reg. 363, 371–72 (1987) (quoting S. Rep. No. 981, 93d Cong., 2d Sess. 130, 564 (1974)). As a result, and by design, the FEC is "inherently bipartisan." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

In establishing the FEC in 1974, Congress directed the Senate President Pro Tempore, Speaker of the House of Representatives, and President each to appoint two of the FEC's six members. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310(a)(1), 88 Stat. 1263, 1280–81 (1974). Congress also provided that the two members appointed by each official "shall not be affiliated with the same political party." *Id.* It amended the law two years later[5] to vest the President with authority to appoint all six members of the FEC but affirmed the partisan balance of the Commission: "No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a)(2), 90 Stat. 475, 475 (1976). This partisan-balancing requirement endures today. 52 U.S.C § 30106(a)(1) (2018).

2. Election Assistance Commission

In 2002, Congress established the Election Assistance Commission ("EAC") to "serve as a national clearinghouse

5. The Court had struck down some of the original law's provisions, on other grounds, months earlier. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

and resource for the compilation of information and review of procedures with respect to the administration of Federal elections." Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 201, 202, 116 Stat. 1666, 1673 (2002). The EAC consists of four members, no more than two of whom may belong to the same political party.[6] *See id.* § 203(a)(1), (b)(2). Congress also established a 110-member EAC Standards Board and directed it to "select nine of its members to serve as the Executive Board of the Standards Board, of whom . . . not more than five may be members of the same political party." *Id.* §§ 211, 213(a)(1), (c)(1).

The EAC's structure is integral to its mission. "Because it is structured as an independent agency with bipartisan membership, it faces less risk of undue political meddling in the technical work of overseeing election vendors than a traditional executive agency would. Its structure could also help avoid dramatic shifts in oversight approaches with a change of presidential administrations." Lawrence Norden, Christopher R. Deluzio, & Gowri Ramachandran, *A Framework for Election Vendor Oversight*, Brennan Ctr. for Justice, 6 (Nov. 12, 2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_ElectionVendors.pdf. The EAC assists states with, among other things, carrying out the Help America Vote Act and its constituent programs. One of those, the Help America Vote College Program,

6. The law provides for two pairs of initial appointees with separate two- and four-year terms. Pub. L. No. 107–252, § 203(b)(2). It mandates that "not more than one of [each pair] . . . may be affiliated with the same political party," and that a vacancy "be filled in the manner in which the original appointment was made and . . . be subject to any conditions which applied with respect to the original appointment." *Id.* § 203(b)(2)–(3).

requires each recipient to be "governed in a balanced manner which does not reflect any partisan bias." *See* 52 U.S.C. § 21122(b).

3. State Election Commissions

The act that established the EAC also placed additional electoral responsibilities on the states. *See, e.g.*, Pub. L. No. 107-252, § 101. At least sixteen states have delegated some of these responsibilities to election boards or commissions. *See Election Administration at State and Local Levels*, Nat'l Conf. of State Legislatures (June 15, 2016), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx. Some of these bodies have partisan-balance requirements. South Carolina's election commission, for example, is "composed of five members, at least one of whom shall be a member of the majority political party represented in the General Assembly and at least one of whom shall be a member of the largest minority political party represented in the General Assembly." S.C. Code Ann. § 7-3-10(a).

Other states guarantee the two major parties will have representation on their election boards. *See, e.g.*, Md. Code Elec. Law Ann. § 2-101(e) ("Each member of the State Board shall be a member of one of the principal political parties. A person may not be appointed to the State Board if the appointment will result in the State Board having more than three or fewer than two members of the same principal political party."); Va. Code Ann. § 24.2-102 (providing that the State Board of Elections "shall consist of three members appointed by the Governor," including two members from "the political party which cast the

highest number of votes for Governor at that election" and one member from the party with the "next highest number of votes"). In Illinois, the legislature's design of the State Board of Elections ensures "strict party balance and [nonpartisanship]." *Gregg v. Rauner*, 124 N.E.3d 947, 959 (Ill. 2018) (citing 10 Ill. Comp. Stat. Ann. 5/1A-2); *see also Vintson v. Anton*, 786 F.2d 1023, 1025 (11th Cir. 1986) ("Alabama constitutionally may, as all States do, so far as we are aware, follow the practice of requiring bipartisanship in the composition of election boards. Such adversary partisan confrontation is universally regarded as an effective means of preventing fraud and ensuring honest elections.").

Under the Third Circuit's reasoning, the First Amendment prohibits such partisan-balancing requirements for federal and state election boards whenever the appointee cannot belong to the party of the appointing authority.

F. State Redistricting Commissions

Many states have attempted to combat partisan gerrymandering "by placing power to draw electoral districts in the hands of independent commissions," a practice this Court has validated. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). As of January 2020, fourteen states had commissions tasked with drawing plans for state legislative districts. *Redistricting Commissions: State Legislative Plans*, Nat'l Conf. of State Legislatures (Jan. 9, 2020), https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx.

Many are enshrined in state constitutions and have partisan-balance requirements. Arizona's five-member Independent Redistricting Commission, for example, is selected from a pool of twenty-five candidates—ten from each of the two largest parties and five from neither of the two largest parties. Ariz. Const. art. 4, pt. 2, § 1(5). From that pool, the majority and minority leaders of the state house and senate each select one member, and the four selected members choose the fifth member. *Id.* § 1(6). California's fourteen-member Citizen's Redistricting Commission comprises five members registered with each of the largest and second largest political parties in California based on registration, as well as four members not registered with either party. Cal. Const. art. XXI, § 2(c)(2); *see also* Cal. Gov't Code §§ 8251–8253.6 (implementing Article XXI of California's Constitution). The votes of at least three members of each of the three groups are required to approve any district boundaries. Cal. Const. art. XXI, § 2(c)(5). In Colorado, the twelve-member Independent Legislative Redistricting Commission is composed of four members from each of the two major parties and four unaffiliated members. Colo. Const. art. V, § 47(10). Michigan seats four members from each of the major parties and five unaffiliated members on its Independent Citizens Redistricting Commission. Mich. Const. art. IV, § 6(2)(f). Adopting the Third Circuit's broad reasoning could lead future litigants to call into question the constitutionality of these frameworks as well.

G. State Judicial Nominating Commissions

Many states have sought to limit partisan influence on the appointment of judges by creating nonpartisan judicial nominating commissions. "Sixteen states . . . require at

least some partisan balance on their commissions, and they do so in several ways." Douglas Keith, *Judicial Nominating Commissions*, Brennan Ctr. for Justice, 6 (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_JudicialNominationCommissions_Final.pdf.[7]

Some states, like Arizona, Idaho, and Nebraska, place a numerical cap on the number of members from a single political party. *See* Ariz. Const. art. VI, § 36 (describing the commission as "nonpartisan"); Idaho Code § 1-2101(1); Neb. Const. art. V, § 21(4). Others, like Kentucky, require that their judicial nomination commissions include a minimum number of appointments from certain political parties. Ky. Const. § 118(2).

Still other states require their commissions to include equal representation from the states' two largest political parties. *See* N.M. Const. art. VI, §§ 35–37; *see also* Conn. Gen. Stat. § 51-44a(a) (capping same-party membership at fifty percent); N.Y. Const. art. VI, § 2(d)(1) (same). And some, like Rhode Island, strive to achieve partisan balance by giving appointment power to the majority and minority leaders in the state legislature. R.I. Const. art. X, § 4 (describing the judicial nominating commission as "independent" and "non-partisan"); R.I. Gen. Laws § 8-16-1(a).

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7. The sixteen states span geography and political leanings: Arizona, Colorado, Connecticut, Delaware, Idaho, Kentucky, Nebraska, Nevada, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, and West Virginia. *See id.*

The solutions these states have enacted are as diverse as the people they are designed to protect. Any affirmance should not throw their validity into doubt.

CONCLUSION

CLC respectfully asks this Court to reverse the Third Circuit's decision and validate the constitutionality of Section 3. If the Court affirms, however, it should do so narrowly to maintain the partisan-balance requirements woven into governmental entities across the country.

Respectfully submitted,

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